AMERICAN CITIZENSHIP.

PART II. UNINCORPORATED PEOPLES AND PEOPLES INCORPORATED WITH LESS THAN FULL PRIVILEGES.

What is the status of the American tribal Indian? Strangely enough there was no decision of the Supreme Court on the status of the individual tribal Indian prior to the Fourteenth Amendment. The case of *Elk* v. *Wilkins*,[1] decided in 1884, rests wholly upon the intended effect of the phrase "subject to the jurisdiction thereof" in that amendment. It is true that the Supreme Court had held in 1831, Marshall delivering the opinion, that the Indian nations were "domestic, dependent nations," but that was said in deciding that an Indian nation was not a *foreign state* within the judiciary clause.[2] It settled nothing as to the status of an individual Indian.

In the case of *Elk* v. *Wilkins*, Elk alleged that he was a citizen of the United States under the Fourteenth Amendment, and though he satisfied the qualifications of a voter under the laws of Nebraska, he had been denied a right to vote on account of his race or color, in violation of the Fifteenth Amendment. The court held that Elk having been born a member of a tribe, which still existed, even though he had severed his connection with his tribe and had taken up his residence among the white citizens of a State, was not a "citizen" of the United States.

So far as the *ratio decidendi* rested upon a literal interpretation of the phrase "born in the United States and *subject to the jurisdiction thereof*," it was erroneous. Two years later the Supreme Court, in *United States* v. *Kagama*,[3] held an act of Congress valid which gave jurisdiction to punish certain crimes committed by one Indian upon another Indian, in a Territory, either within or without an Indian reservation, to the ordinary courts of the Territory.[4] These courts, of course, were creatures of Congress. The

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[1](1884) 112 U. S. 94.

[2]The Cherokee Nation *v.* The State of Georgia (1831) 5 Pet. 1.

[3](1886) 118 U. S. 375.

[4]The act also provided that if the crime was committed on a reservation within the limits of a State, the courts of the United States (excluding both state and Indian courts) should have jurisdiction. The facts in the case involved this latter provision, but the court said that the same principle was involved in both. Each provision asserted the direct legislative and judicial jurisdiction of the National Government.

case necessarily held that the individual tribal Indians were under immediate subjection to the United States.

The true ground of the decision in *Elk's* case, however, was that this phrase "subject to the jurisdiction thereof" was specifically intended by its framers to exclude the tribal Indians from its scope. The court reached this result from a view of the expressions relative to Indians used in the Constitution, the traditional policy toward Indians, and the language of the Civil Rights Act of April 9, 1866, for which the Fourteenth Amendment was known to be a substitute. From the four corners of the Constitution and our constitutional history it appears that the tribal Indians were not included and not intended to be included in "the people of the United States." This was the same mode of reasoning which Chief Justice Taney applied to the case of the free negro, and whether we agree with that application of it or not, we cannot quarrel with the mode. It may be denominated the doctrine of non-incorporated peoples.

The specific decision, as stated by the court, was:

"The plaintiff, not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no right secured by the Fifteenth Amendment, and cannot maintain this action."

It was not necessary to decide that a tribal Indian was an alien, although it seems that Mr. Justice Gray so considered him. Mr. Justice Gray said:

"The Indian tribes, * * * were not, strictly speaking, foreign States; but they were alien nations, distinct political communities * * *. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States * * *.

"The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States, * * * except under explicit provisions of treaty or statute to that effect * * *."

The alienage *vel non* of the Indian might be raised under some of the statutes of the United States, but it cannot come up under the Constitution. This instrument confers no privilege upon aliens as such. In the judiciary clause the judicial power of the United States is declared to extend to certain cases in which a citizen or subject of a foreign state is a party, but since an Indian, if an alien, is not a citizen or subject of a foreign state, the determina-

tion that he cannot obtain a right under that clause[5] does not settle his status.

Still in spite of this absence of square decision it seems to be the law that non-naturalized tribal Indians are aliens. And while it is a practical objection to this rule that such Indians would be stateless in international relations, since the United States would not permit the international recognition of their "nations," yet if our nationality laws do not embrace them, the remedy is by legislation, and until there is legislation covering them, they remain stateless aliens. The dilemma should not be met by a departure from the constitutional equivalence of nationality and citizenship.

The status of stateless aliens is well recognized by European writers by whom the stateless alien is technically called the *heimatlos*. There are probably a large number of Caucasians in the world to-day who are not nationals of any state. In 1889 there was such a large number of persons in France without any nationality that their existence was one of the important influences in the redrafting of the French nationality laws. Illustrations of stateless persons under existing legislation of modern states are given in almost every book on international law. The occurrence is less frequent to-day than formerly, for it has been a tenet of *legislative* theory for many years in Europe that nationality laws should be so framed as to impose nationality upon every person.[6] No European student of nationality laws would be shocked at the in-

[5]Paul *v.* Chilsoquie (1895) 74 Fed. 401. In Wilson *v.* The City Bank (1838) 3 Sumner 422, Fed. Cas. No. 17,797, C. P. and B. R. Curtis, counsel, argued: "The bill avers that the plaintiffs are *aliens*. It pursues the language of the act of Congress * * *." But Story, Circuit Justice, held that, "the bill ought to have alleged that the plaintiff was a subject or citizen of some one foreign state." And see Picquet *v.* Swan (1848) 5 Mason 35, Fed. Cas. No. 11,134. The report of Waters *v.* Barrill (1868) 131 U. S. lxxxiv, does not show what allegation was made in the declaration.

On the other hand, in Michaelson *v.* Dennison (1808) 3 Day. 294, Fed. Cas. No. 9,523, Livingston, Circuit Justice, held, that an allegation that a party was "a foreign subject, *viz.*, a subject of the King of Sweden" was not sufficient. "He must be stated to be an alien in express terms," for he may have a double nationality, American as well as Swedish. The distinction seems sound, for the act conferring jurisdiction on the Circuit Court as it then stood used the words cases in which "an alien is a party;" and while Congress could not grant more extensive jurisdiction than that covered by the phrase of the Constitution,—"citizens or subjects of a foreign state," it might grant less. The act of March 3, 1891, reproduces the words of the Constitution so that it is no longer necessary to aver alienage in addition to the allegation of some particular foreign nationality. Nichols Lumber Co. *v.* Franson (1906) 203 U. S. 278; Hennessy *v.* Richardson Drug Co. (1903) 189 U. S. 25.

[6]See 1 Weiss, *Droit International Privé* (2d ed. 1907) 20-24.

formation that there are a few thousand stateless aliens in the United States. It merely indicates that the United States has not interested herself in a careful formulation of her nationality laws, which is true. In Europe a great deal of attention has been paid to this subject in the last thirty years, for several reasons, among them, the injustice of permitting persons to be wanting in nationality altogether, since compulsory military service, in the execution of which most of the continental states pursue the same policy, cannot be required of aliens without violation of international law; and the stateless alien would be free from service in any and all countries. Hence a common endeavor to so frame nationality laws as to avoid leaving any one stateless. No similarly pressing need for accurate legislation has existed in the United States.

Attention may be called to other *dicta* sustaining the view that unnaturalized tribal Indians are aliens. In the famous case of *The Cherokee Nation* v. *Georgia,*[7] Chief Justice Marshall said:

"The counsel have shown conclusively that they [the Cherokee Nation] are not a state of the union, and have insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state."

But, though the Chief Justice fully demonstrated that the Indian nations were not foreign states, he does not in any way combat this view as to the status of the individual Indian. In fact the remark immediately following the above quotation may be taken as admitting the alienage of the individual tribal Indian:

"In the general, nations *not owing a common allegiance*[8] are foreign to each other."

Mr. Justice M'Lean, concurring in *Worcester* v. *Georgia,* said:

"No one has ever supposed that the Indians could commit treason against the United States. We have punished them for their violation of treaties; but we have inflicted the punishment on them as a nation, and not on individual offenders among them as traitors."[9]

Chief Justice Taney said, in the *Dred Scott* case:

"These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been ac-

[7] *Supra,* 16.

[8] The italics are the present writer's.

[9] (1832) 6 Pet. 515, 583.

knowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people."[10]

It is difficult at this day to understand how distinct and apart the Indian nations were regarded in the early part of the last century. Though Marshall called them "domestic, dependent nations," this was to distinguish them from foreign states, and he nevertheless considered them distinct and separate political communities. In some of the early treaties between the United States and the Indians, the nationals of the respective parties were referred to as citizens of the United States on the one hand, and citizens of the Indian nation on the other. Quite recently there has been a great deal of litigation, some in the Supreme Court of the United States, to determine who are "citizens" of the Cherokee Nation.

The view early taken and long entertained was that with the internal affairs of the Indian nations the United States had no concern, her power extending only to regulating their external affairs and particularly their relations to the American people. The jurisdiction which the United States exercised to punish its citizens for offenses against Indians in Indian country was regarded by Mr. Justice Johnson as an exercise of the extra-territorial jurisdiction of a country over its citizens abroad.[11]

A quarter of a century ago a marked change took place in the attitude of the United States toward the Indian. This is brought out clearly in the legislation, *viz.*, the act of March 3, 1885, con-

[10](1856) 19 How. 393, 404.

[11]Concurring opinion, Cherokee Nation *v.* Georgia *supra*, 31.

sidered in *United States* v. *Kagama,* referred to above, and held constitutional. This act asserted the direct and immediate jurisdiction of the United States over the individual tribal Indian. Its effect, however, was consistent with the view that the then living tribal Indians, non-naturalized, were aliens, for Congress merely declared certain offenses committed by one Indian upon another, in certain localities, crimes against the United States, and conferred jurisdiction upon United States courts to try such crimes.

An act of March 3, 1871, had provided that,

"hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power, with whom the United States may contract by treaty."

Thereafter Indian affairs were to be dealt with exclusively by congressional legislation. Neither the act of 1871 nor that of 1885 expressly incorporated tribal Indians into our citizenship, and it seems that this legislation did not imply any intent on the part of Congress to regard the non-naturalized Indian as incorporated. The law still remains as stated by Mr. Justice Gray, that until naturalized by express legislation the tribal Indian remains alien. The general naturalization law of the United States being confined to blacks and whites is not available to the Indian.[12]

By special acts or treaties particular tribes have been naturalized collectively,—and some treaties or acts of Congress naturalizing the inhabitants of particular acquired territory have embraced the Indians resident therein.[13]

In 1887 a policy of general naturalization of tribal Indians was adopted by Congress.

"Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward."[14]

This new policy was embodied in the Lands in Severalty Act

[12] 1 Moore's Dig. of Inter. Law 33; Van Dyne, Citizenship 58.

[13] Van Dyne, Citizenship 235 *et seq.,* and see opinion in Elk *v.* Wilkins *supra,* for instances of collective naturalization of particular tribes. United States *v.* Lucero (1869) 1 N. M. 422, as to Pueblo Indians.

[14] Brewer, J., delivering the opinion of the court in the Matter of Heff (1905) 197 U. S. 488.

of 1887. This act confers full and absolute citizenship on the Indian allottee, and the Indian allottee passes out of the status of "ward of the nation" and over his person the national Government ceases to have any peculiar jurisdiction.[15]

He becomes by virtue of that act, as it declares, "a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens," and becomes "subject to the laws, both civil and criminal, of the State or Territory in which * * *" he resides.

Equally full citizenship is conferred by the act upon other Indians than allottees, *viz.:*

"every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life."

It was evidently the intention of Congress, fully expressed, to incorporate every Indian, of the classes embraced, upon the fulfillment of the conditions, into our citizenship with *all* the privileges conferred by the Constitution upon citizens. That they might have been made citizens without some of these privileges seems clear. A recent decision of the Supreme Court has lent color to this suggestion.

The case dealt with the effect of an allottment not made under the Lands in Severalty Act, and made without revoking the reservation and without express provision for subjection of the allottees to the laws of the State in which they resided, though full citizenship was conferred, and the question was whether subjection to state laws was necessarily implied, or whether the allottees remained subject to national laws, and particularly in this instance to sec. 9 of the act of March 3, 1885, which provides that Indians committing against other Indians on a reservation in any State

[15]Matter of Heff *supra.* The act provides that for twenty five years after allotment, and for such further time as the President may in his discretion extend the period, the United States holds the lands in trust for the individual allottee and his heirs. The double incorporation into citizenship and subjection to state and territorial laws was to take effect at the date of the allotment (though the trust continued), according to the language of the original act, Matter of Heff *supra,* but an act of May 8, 1906, has amended the former to postpone the point of time at which the allottee is to become a citizen in full right and become subject to the laws of the State or Territory in which he resides to the receipt by him of the legal title by a patent in fee, which is to be given at the expiration of the trust period. Whether the amendment is to have retroactive effect as to allotments already made is not clear. It would seem that the peculiar jurisdiction once relinquished could not be recovered.

any of the crimes named are subject to Federal laws and to be tried in Federal courts. The court said:

"Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States."[16]

Whether "Indian country" should be regarded as "unincorporated territory" of the United States, within the meaning of that expression as used in the *Insular* cases, seems not to have been determined. Of course, it was decided in *Worcester* v. *Georgia*,[17] and ever since adhered to, that Indian country, even though within the geographical boundaries of a State, was not incorporated into the State, and that the State could not extend its laws over the Indian country, which remained under the exclusive jurisdiction of the National Government. Whether Congress in exercising its jurisdiction is free from the restraints imposed upon it when legislating over incorporated territory has been touched upon, but the relation of this subject to the doctrine of unincorporated territory has not been discussed. All the necessary power to adequately control Indian relations has been obtained by regarding the Indian people as unincorporated, and it has not been necessary to consider the status of the *territory* they occupy in relation to that doctrine. These propositions are distinctly severable. In accordance with the view that the people themselves were unincorporated, but mere "wards of the nation," the constitutionality of an act of Congress was sustained prohibiting the sale of intoxicating liquor to an Indian ward of the nation, anywhere in

[16]United States *v.* Celestine (1909) 215 U. S. 278, 290-1. And see the case of Dick *v.* United States (1908) 208 U. S. 340, in which the court held that the peculiar jurisdiction of the National Government might be partially, and at least temporarily, continued over the citizen Indian, by impressing Indian lands with an anomalous sort of negative easement.

[17]*Supra.*

the United States, even within a State.[18] Such an exercise of police power by Congress in a State could be justified only by the peculiar personal relation of the Indian ward to the National Government.

In the *Insular* cases, on the other hand, it was necessary to hold that the *territory* itself was "unincorporated," for in the *Downes* case,[19] the question was whether goods produced in the insular possessions, and shipped therefrom to the continental domain of the United States, whether the producer or shipper was a citizen of the United States, a "native inhabitant" or an alien, could be subjected to a duty laid in disregard of the "uniformity clause;" and in the *Dorr* case,[20] whether a person might be subjected to trial for a crime, without a jury, by reason of the character of the territory in which the crime was committed and the trial held. No account whatever was taken of the political status of the accused, though it is known *aliunde* that he was a white citizen of the United States, and Mr. Justice Harlan in his dissenting opinion rightly said that the reasons for the decision necessarily made it applicable whether the accused was a citizen of the United States in the islands on official duty of his Government, or a "native inhabitant."

In *Lone Wolf* v. *Hitchcock*,[21] the former complained that an act of Congress had altered an allottment of land in which he claimed a vested interest by virtue of an Indian treaty concluded in 1867, prior to the act in question, and that it did so in violation of the Fifth Amendment, presumably either the due process of law clause or the clause prohibiting Congress to take private property for public use without just compensation. The tribal relation still continued, and the court clearly considered the Fifth Amendment as not restricting Congress in its dealings with Indian tribes, saying:

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to the control by the judicial department."

Obviously if Congress in dealing with Indian tribes is subject to the limitations which bind it in other legislation, whether an

[18] United States *v.* Holliday (1865) 70 U. S. 407.
[19] Downes *v.* Bidwell (1901) 182 U. S. 244.
[20] Dorr *v.* United States (1904) 195 U. S. 138.
[21] (1903) 187 U. S. 553.

act of Congress violates or transcends a limitation is a judicial question.

In *Talton* v. *Mayes*[22] it was held that the Fifth Amendment requiring indictments to be by grand jury did not apply to criminal proceedings instituted by an Indian nation as to crimes committed by one Indian upon another.

Mr. Justice White, for the court, said:

"True it is that in many adjudications of this court the fact has been fully recognized, that although possessed of these attributes of local self government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, where the cases are fully reviewed. But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government."

The cases referred to by Mr. Justice White in his discussion leading up to the conclusion just quoted merely sustain the view that the Indian nations had powers of local government independent of and not derived from the *States* in which they were geographically located, that they were not subject to the jurisdiction of those States. This is particularly true of *Worcester* v. *Georgia*. The case of *The Cherokee Nation* v. *Georgia* held that the Indian nations were not foreign to the United States; while the only other case referred to by Mr. Justice White, *United States* v. *Kagama*, holds that Congress has direct or immediate jurisdiction over the Indian tribes; that they are under direct subjection to the United States. None of these cases sustain the view that the powers of government exercised by these tribes on American soil are not derived from the consent of the American nation. It certainly would be an anomaly to admit that the jurisdiction of this nation is thus qualified. Mr. Justice White assents to this view, but holds that the powers of local government do not derive their sanction from the Constitution or Government of the American people.

It is submitted that this position is untenable. Considering that Congress possesses complete jurisdiction over the Indian tribes

[22](1896) 163 U. S. 376.

and over the territory they occupy, it is submitted that the legislative power of the tribes can exist only by delegation from Congress, tacit or permissive though it may be. Yet if the power of Congress is "plenary," unrestrained by the Fifth or Sixth Amendment in legislating for the Indian tribes, it may provide for indictment and trial of offenses committed by one tribal Indian upon another, without either grand or petit juries.

The result rests purely upon the non-incorporation of the Indian tribes, as peoples. Since from an early day the trial of offenses committed by others than Indians in Indian country, and the trial of cases in which others are parties have been excluded from the jurisdiction of Indian courts, it seems never to have been necessary to decide whether a citizen of the United States could be tried in Indian country for a crime, without a jury. Perhaps the better view is that the Indian country is "incorporated," in the sense of the *Insular* cases, and that consequently the constitutional limitations are applicable to Congress in legislating over it, so far as such legislation affects the rights of others than unincorporated peoples. It should be recalled that the power of Congress to govern the Indian tribes is distinct from its power to make rules and regulations for the territories of the United States.

The following deductions may reasonably be drawn from the foregoing discussion:

1. That individual tribal Indians are aliens and in no sense American nationals, prior to express naturalization.[23]

2. That, as stateless aliens resident in the United States, the National Government assumed over them a peculiar guardianship justified by the necessities of their condition and not inconsistent with their status of stateless aliens. This guardianship from harms within the United States had no relation to the protection extended to the citizen abroad.

3. That Congress in legislating over them has been free from some of the constitutional limitations that restrict its power when acting in its ordinary legislative capacity, not because they were aliens, for the mere alien is embraced within the constitutional

[23]The writer does not overlook views in conflict with his own. Attorney General Caleb Cushing, in 1855, expressed his view that non-naturalized American Indians were "subjects," 7 Opinions of Atty's-Gen. 746, and see 1 Moore's Dig. of Inter. Law 30-34. For a rather clumsy recognition by the State Department of a right to issue a quasi-passport to individual Indians who in the particular instances might not have been naturalized, see 3 Moore's Dig. of Inter. Law 878-9.

limitations which grant immunities to "persons;" nor because they are stateless aliens, but because they were *large aggregations* of peculiar peoples within the territorial jurisdiction of the nation, the government of whom was specifically and separately conferred by the Constitution upon Congress in such a manner as when viewed in its historical setting gave Congress that power free from some of those limitations.[24]

4. That Congress has the power to incorporate such aliens into our citizenship with full right, if Congress deems it expedient to so clothe them.

5. That Congress has the power to so make them citizens that they shall enjoy less than the full special privileges of the citizen, or to make them citizens reserving by way of qualification a special guardianship for their benefit.[25]

What is the status of the native inhabitants of our insular possessions, children born to them after annexation and of persons born in those islands whose parents are not native inhabitants? First, it may be well to exclude from the discussion the Territory of Hawaii. All persons who were citizens of the Republic of Hawaii on August 12, 1898, were collectively made citizens of the United States by the act of Congress, April 30, 1900; moreover, that act "incorporated" the Hawaiian Islands and made them "a part of the United States in the fullest sense,"[26] so that there is no question but that any person born therein is a citizen of the United States by virtue of the Fourteenth Amendment, including doubtless *ante-nati* as well as *post-nati*.[27] Assuming that the Philip-

[24]So far as power to govern the Indians is expressly granted by the Constitution, it is to be found in Art. I, Sec. 8, § 3: "To regulate Commerce * * * with the Indian tribes."

[25]As to any remaining non-naturalized Indians, the protection of the United States should not be extended to them abroad, until express legislation clothes them with citizenship (nationality). A citizenship with less than full internal privileges would be sufficient. The writer has submitted in Part I of this article that "citizen" in the Constitution is the exact equivalent of national, but that the Constitution confers upon the possessor of this recognized status certain internal privileges which that status, as impliedly defined in the Constitution, would not of itself have carried with it. The status might be conferred without those additional privileges. So far, however, whenever Congress has conferred citizenship on the alien Indian it has been citizenship with the full privileges, both definitional and those expressly and additionally created by the Constitution.

[26]See Hawaii *v.* Mankichi (1903) 190 U. S. 197, 211, 220.

[27]The law must be the same for Alaska, which is also incorporated. Rassmussen *v.* United States (1905) 197 U. S. 516.

pines and Porto Rico are still "unincorporated," as was held in the *Insular* cases, the status of persons born there, *whose parents are not "native inhabitants,"* depends upon whether the first clause of the Fourteenth Amendment is "applicable" to annexed but unincorporated territory.

There is a marked distinction, a most fundamental and conclusive distinction, between the opening phrases of the Fourteenth Amendment on the one hand, and the uniformity of duties clause and the Fifth and Sixth Amendments, on the other. The former is a self-executory clause operating wherever the Constitution is in force; the latter clauses are limitations on the legislative power of Congress. They merely restrain Congress in passing legislation, and the sole question as to them is, whether they *apply to Congress* when legislating for every portion of the American territory; and it has been held in the *Insular* cases that Congress is not under the same limitations when legislating for "unincorporated" territories that control it in legislating for the other portions of the American domain.

Dorr v. *United States*[28] merely decides that Congress in creating a system of criminal procedure for the Philippines is not hampered by the Sixth Amendment, because Congress has never consented to govern those possessions with such a restriction of power; that the treaty-making power in annexing those Islands and Congress by its tacit refusal to "incorporate" have reserved to Congress more freedom of legislation thereover. Now the opening phrases of the Fourteenth Amendment have nothing whatever to do with legislative power of Congress. This provision that "all persons born * * * in the United States and subject to the jurisdiction thereof are citizens of the United States * * *," is not a limitation on the legislative power of Congress in the sense of the term limitation in American constitutional law.

The expression "constitutional limitation" may be conceived in three senses, (1) a loose, untechnical sense, (2) a liberal sense, commonly given it, and (3) a strictly accurate sense, narrower than common usage adopts. The loose, untechnical sense would be that which would characterize as a limitation anything which Congress has no power to do. In this sense the rule that Congress has only such power as is granted, expressly or by correct implication, would be a limitation, or the source of many limitations. That Congress can not alter or "amend" the Constitution

[28] *Supra.*

does also, indeed, make it a limited legislature, yet this rule implied, *inter alia,* from the express provision for amendment does not make the amendment provision a "limitation" in any customary sense. It is only because the opening clause of the Fourteenth Amendment is unalterable by Congress that it can be regarded as a limitation, and then only in the loose and unreceived sense of the term.

The second, or common usage of the term makes it include limitations in the third or narrow sense and also *express prohibitions* against Congress' doing certain things. This will become clear upon considering in a strictly accurate sense, that a limitation is a restriction upon the exercise of a legislative power granted to Congress.[29] It assumes that Congress has been granted a particular power but that that power is granted subject to a qualification. The provision of the first amendment that "Congress shall make no law respecting an establishment of religion" is merely a prohibition and not a limitation in the narrow sense, at least so far as that part of the United States which is organized into States is concerned; for Congress is not elsewhere in the Constitution granted any power to legislate as to religion. It has frequently been pointed out that so far as the part of the United States referred to is concerned, it was superfluous to adopt this express prohibition, since it was necessarily implied from not granting power in the premises. And so as to some other clauses of the first ten amendments.

Yet as to the rest of the United States, *viz.,* the Territories in general, or at least, the incorporated territory, this prohibition may be regarded as a limitation on the general legislative power granted to Congress to make all needful rules and regulations respecting such territory.[30]

Now it must be clear that the opening clause of the Fourteenth Amendment is neither a congressional limitation in the narrower sense nor in the sense which includes prohibitions. It is not addressed to Congress at all. That is what truly distinguishes it. It is a purely self-executory law of the Constitution. It is no more a limitation upon Congress than is the provision for only one President, or that no one shall be eligible to the Presidency except

[29]Of course, a similar restriction upon the powers of a state legislature, or any other organ of government, would fall within the definition, but the point under discussion is congressional limitations.

[30]Whether this limitation is "applicable" to Congress in legislating for unincorporated territory is an open question.

a natural-born citizen, or that there shall be two houses of Congress.

It is a bit of direct legislation by the sovereign,—declaring that certain persons are citizens. The Constitution recognizing the existence of some and having created certain other privileges of citizenship, here declares who are eligible to those privileges; just as it creates certain offices and declares who are eligible thereto.

To say therefore that since in *Downes* v. *Bidwell* it was held that the "insular possessions" are not a part of the "United States" as that expression is used in "the uniformity clause," the question here is whether they are within the "United States" as used in the Fourteenth Amendment, is to make the problem turn apparently upon a definitional *ipse dixit,* and to obscure the principle involved in the solution.

The fundamental difference in the character of this directly legislative provision and the limitations heretofore held inapplicable to Congress in legislating for "unincorporated territory" is so marked, it is submitted, that the Supreme Court of the United States will not hesitate to declare it applicable throughout the American domain, and in force in the insular possessions.

It will not necessarily follow from this that persons there born, of "native inhabitant" parentage, will be included in its scope, in that they will likewise be citizens in an unqualified sense. If reiteration is pardonable, the phrase "unincorporated territories" does not mean that such territories are not American, not a part of the United States, but that they are such a part of the United States as to which Congress has, so to speak, an abnormal freedom of legislation. They might more aptly have been called abnormally incorporated territories. That the "native inhabitants," the people themselves, were abnormally incorporated follows more clearly from the language of the treaty than it does that the territory was abnormally incorporated:

"The civil rights and the political *status* of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

By the annexation, the transfer of sovereignty and the transfer of allegiance, though the inhabitants became American nationals, and therefore unavoidably citizens of the United States, their internal political status, the constitutional privileges they shall enjoy by virtue of their citizenship, are to be only such as Congress

shall grant. Just as the citizen privileges of the free negro were qualified by reason of his peculiar incorporation, just as Congress can deal with abnormal legislative freedom with the groups of stateless Indian aliens, because of their peculiar relation to the United States, so Congress is vested with abnormal power over these abnormally incorporated citizens. So far, Congress has hesitated to apply the term citizens of the United States to these new "Americans," but no harm can come from recognition that this is their status, since it need not carry with it any of the constitutionally created privileges of the citizen that Congress desires to withhold. No one has objected to conceding to them all the rights or to imposing upon them all the duties, that international law attaches to citizenship.

If the disability of the native inhabitants resulted solely from their inhabiting unincorporated territory, then it would follow that a child born in other portions of American territory, of parents who are "native inhabitants" of our insular possessions would be citizens of the United States unqualifiedly, by virtue of the Fourteenth Amendment. The doctrine of *Wong Kim Ark's* case[31] would be applicable, if the native inhabitants as *people* did not have an abnormal relation to the American state. But if their relation is abnormal, a child born of Filipino parents in Massachusetts may well take the abnormal status of its parentage and be only a qualified citizen. Dred Scott was not born in "unincorporated" territory. So with the tribal Indian. Notwithstanding that a child born in the United States of an alien Chinese father is a citizen, an Indian child might be born in a State, away from his tribe, prior to the act of 1887 (and since also, if he is one not embraced therein) and if his parents were members of a tribe, and not citizens under any of our legislation, that child would not be a citizen of the United States.

In short, as to unincorporated people and abnormally incorporated people, our law seems to be that their children wherever born have no higher status or privileges than their parents. The better view is that the opening clause of the Fourteenth Amendment was merely declaratory of the previous law, so that the case of the free negro would not have been different had that rule been written in the Constitution before the war; and the decision settling the status of the Indian come after the amendment. So that while the Fourteenth Amendment is applicable to the territory of our

[31] (1898) 169 U. S. 649.

insular possessions, it does not affect our abnormally incorporated people, either while inhabiting those islands or elsewhere in the United States.

The source of their qualified citizenship is not that amendment, but the transfer of their allegiance upon the annexation of their territory.

Since the Fourteenth Amendment is in general there applicable, it follows that a child born in the Philippine Islands or Porto Rico of any other parentage than "native inhabitant" or American tribal Indian is a citizen of the United States. For example, a child born in the Philippines whose father is an alien German, Spanish or Chinese, or an American citizen, is a citizen of the United States by virtue of the Fourteenth Amendment. This amendment operates throughout our domain, being *directly* legislative, and with the same force everywhere to make every person born on any portion of our soil a citizen, unless by blood he belongs to a class of people sustaining one of the recognized abnormal relations to the United States.

Fortunately all these logical conclusions are highly expedient, though they do not rest for support upon the inconvenience of an opposite doctrine. As to children born of alien parents in our insular possessions and residing there, since they are American citizens, the United States is not subject to claims in their behalf on the part of foreign governments whose laws might include them among their nationals. It supports the theory of the treaty as to the political status of the native inhabitants, and, lastly, it settles the status of children born to citizen parents in those possessions. For if the Fourteenth Amendment does not confer citizenship on the child of an American citizen, born in the insular possessions, his citizenship is involved in doubt. If he is not born "in the United States" under the Fourteenth Amendment, there is no provision of American law conferring citizenship on him, unless it be the act of 1855. This act provides,

"All children * * * born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Literally this act applies only to a child born "out of the limits and jurisdiction of the United States." Certainly the insular possessions are within the international boundaries of the United

States, and within the jurisdiction thereof. They have been held not to be "foreign," at least within the meaning of the tariff laws. Does the statute mean "United States" in the sense of *Downes* v. *Bidwell?* Did the Congress of 1855 so intend?

The only way the act of 1855 can be considered applicable is by a resort to *a fortiori* interpretation, *viz.*, that since a child of a citizen father born abroad is a citizen, much more so should one be who is born in dependent or appurtenant territory of the United States. No one, however, would care to rest his citizenship on even that strong an inference, for it remains an inference.

Even this inference is of limited scope, for in order that a child may be a citizen of the United States, by virtue of the act of 1855, it is not sufficient that his father be a citizen, but the citizen father must have resided in the United States. Whether a temporary sojourn in the United States, a permanent residence, or domicile is intended, it does not appear, but doubtless a substantial residence, at least, is intended. Already there are American children born in our insular possessions who have attained the age of twelve years. Will the child born to such a person, in time, be a citizen, or not be, according as its father will have or will not have resided in the United States? Is it our policy to discourage American families from permanently identifying themselves with the government, the educational work and economic development of our dependencies?[32]

So far the State Department seems to have entertained the theory that the "native inhabitants" of Porto Rico and the Philippines are nationals but not citizens.[33] The Supreme Court has not spoken. Congress has not as yet clearly expressed itself, and its attitude must be inferred from the following legislation:

(1) The act of April 12, 1900, establishing a civil government for Porto Rico, which provides:

[32]The act of 1855 can be easily amended, it is true, but the amended act would be subject to two different shades of doubt now entertained by some, (1) that it is unconstitutional because not a naturalization statute, or (2) that it is a naturalization statute and that consequently citizenship acquired under it is not "natural-born" citizenship, requisite for eligibility to the Presidency. Is the future of a Philippine governor's son, born in the islands, to be clouded with this doubt? The existence of these doubts should be taken into account though they may be groundless. The views of the writer are that the act of 1855 is not a naturalization statute because it confers citizenship at birth; and it is a constitutional exercise of the "resulting power" of Congress to regulate our foreign relations and foreign intercourse.

[33]3 Moore's Dig. of Inter. Law 315, 874 *et seq.*

"That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, 1899, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, 1900, in accordance with the treaty of peace * * *."

(2) The act of July 1, 1902, establishing a civil government for the Philippine Islands, which makes the same provision, *mutatis mutandis,* designating the persons embraced as "citizens of the Philippine Islands and as such entitled to the protection of the United States."

(3) The act of July 14, 1902, amending a provision of the Revised Statutes which restricted the issuance of passports to citizens, and making it read:

"No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."[34]

Since the first two of these acts extend the protection of the United States to Porto Ricans and Filipinos, Congress impliedly recognizes them as American nationals or citizens of the United States, though the cautious manner in which this is done evinces the intention of Congress not to confer full constitutional internal privileges of citizenship. The extent to which these may be conferred depends upon future legislation. The expression Congress "recognizes" them as qualified citizens is used advisedly, because they acquired that status by the change of sovereignty and the transfer of their allegiance.

That Congress had the Porto Ricans and Filipinos in mind in making the change in the passport law is inferable from the change made at the same time in Section 4075 of the Revised Statutes, by which the "chief or other executive officer of the insular possessions" are made issuing officers.

The language of the passport provision as amended is inconsistent with itself: "Persons * * * owing allegiance, whether citizens or not * * *;" assuming, as we must, that Congress meant permanent allegiance, as distinguished from the "temporary allegiance" by which the subjection of a resident alien is faultily designated. Yet it is to be noted that though Congress may have

[34]R. S. sec. 4076. See 3 Moore's Dig. of Inter. Law 864, 877.

had the Porto Ricans and Filipinos in mind in making this alteration as a whole, there is nothing in the language to expressly connect these peoples with the particular phrase, "or not" citizens. If it be admitted, however, that Congress meant to say that Porto Ricans and Filipinos are not citizens so far as the issuance of passports is concerned, it must be also admitted that Congress has assumed an inconsistent attitude in extending the protection of the United States to them.

The issuance of passports is a far less significant matter than the extension of protection, in the broader sense. A passport is an identity certificate. It merely furnishes the bearer with formal evidence by which he may, if called upon, substantiate his claim to the rights of an alien in a foreign country, or to treaty privileges, if any. It is only *prima facie* evidence of his citizenship, conclusive neither upon the government issuing it nor upon foreign powers, though entitled to high respect from them.

It is not a pledge or guaranty that the government issuing it will intervene in his behalf by way of protest or reclamation, should he meet with injustice abroad. This intervention, usually amicable, but potentially hostile, constitutes the method of exercising the function of protecting, and is, therefore, of a higher and more serious nature than the issuance of passports. Since the United States has extended its protection to Porto Ricans and Filipinos, there is no sound reason why they should not be issued passports as citizens of the United States.[35]

Should Congress see fit to go further and confer the special

[35]The act of March 2, 1907, is a further evidence of the misleading inspiration under which Congress has recently been acting in the matter of passports. It not only confuses the issuance of passports with extending protection in the broader sense, but admits to passports and protection persons who are not citizens or nationals at all, but who have merely declared their intention to become such and have resided in the United States three years, except that protection is not to be extended in the country of which they were citizens prior to their declarations of intention. Since probably the laws of no state provide that a mere declaration of an intention to renounce its nationality (see the form of this declaration in sec. 27, act of June 29, 1906; 34 Stat. L. 603), or of intent to assume at a future time a different nationality, *ipso facto* destroys the existing nationality of the declarant, this claim of a right to intervene in behalf of an alien will certainly be repelled, not only by the country whose nationality the declarant bears, but other states as well. Amicable intervention is permitted under existing rules of international law only in the interests of nationals of the intervening state. If there are any exceptions to this doctrine, they are truly exceptional and must rest upon some recognized international practice. See Part I, 11 COLUMBIA LAW REVIEW 249. The act here criticized does not purport to alter the naturalization acts, under which citizenship dates from the issuance of final papers.

privileges which the Constitution confers upon the normal citizen, and change their present status of qualified citizens to that of citizens with full rights, it is conceived that no harm will follow.

If the facts justified the fear that there might be a migration in such numbers, or of such character, from the insular possessions to our continental domain as would be harmful to the economic or social welfare of either portion of our territory, it might be well to reserve from the grant of other constitutional privileges, the right of free migration through the empire,[36] or, in the alternative, or perhaps additionally, the right of a citizen of the United States to become a citizen of any State by domiciling himself therein, and thereby acquiring under Art. IV, Sec. 2, "the privileges and immunities of a citizen in the several States."

So far as the facts have been revealed to this generation, however, the fear referred to is not justified, and the inhabitants of our insular possessions, or any class of them, are not excluded from our continental domain under our immigration laws as they now stand.[37]

In fact it may safely be asserted that the special internal privileges of a full citizen of the United States are not of such a character as to warrant their denial to any class of persons who are freely allowed to immigrate into this country. Doubtless this is the reason we permit alien negroes to become naturalized, since our immigration laws do not exclude them. True our legislation on these related matters is not consistent. But is it not true that any race or class of people who are not so uncongenial as to be denied entrance and settlement in our communities should be allowed, and required, where possible, to assume the burdens of citizenship, and with them the few privileges?

But as to the native inhabitants of our insular possessions, Congress may, if it deems advisable, reserve freedom to restrict their immigration, and complement their qualified citizenship with all the other internal privileges of the citizen, without loss of control, for so long as they are restricted, as to permanent residence, to our insular possessions, Congress has sufficient freedom of legislation over them by virtue of the unincorporated character of their territory they occupy.

Finally a fourth bit of recent legislation should be considered. Sec. 30 of the Naturalization Act of June 29, 1906, provides:

[36]See Crandall *v.* Nevada (1867) 6 Wall. 35.

[37]See Gonzales *v.* Williams (1904) 192 U. S. 1.

"That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law."

The same comment may be passed upon this as is made above on the new passport clause, *viz.*, that Congress does not point out what classes of persons "owe permanent allegiance to the United States," but are "not citizens." This language could scarcely refer to non-naturalized Indians in view of the position taken by the Supreme Court in numerous *dicta.* If Congress intended it for the benefit of Porto Ricans and Filipinos, two remarks may be made.

First, it is not necessarily inconsistent with the position taken in this article that these peoples are already qualified citizens, for it may be regarded as a provision whereby those of them who become residents of any State or organized Territory may acquire all the additional rights of citizenship.

Secondly, it re-enforces the views above expressed that there is no ground of public policy against conferring full citizenship upon those members of these classes, the bulk of them, who remain permanently in their islands; that Congress sees as yet no objection to their migration to our continental domain, and that so long as they are permitted to migrate, there is no objection to giving them all the privileges of citizenship.

In short there is no ground of policy that would justify the Supreme Court in allowing the plain equivalence of nationality and citizenship in our law to be distorted.

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